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HIGH COURT OF CHHATTISGARH, BILASPUR

CRIMINAL APPEAL No. 158 of 2006

Dewar Singh
Vs.
The State of Chhattisgarh

JUDGMENT

Post for 25.06.2007

Sd/-
Sunil Kumar Sinha
Judge

(26)

HIGH COURT OF CHHATTISGARH, BILASPUR

CRIMINAL APPEAL No. 158 of 2006
(JAIL MATTER)

APPELLANT - Dewar Singh, s/o Sadaram Sahu, aged about 60 years, r/o village Maharum, P.S. Dongargaon, Distt. Rajnandgaon (C.G.)

Versus

RESPONDENT The State of Chhattisgarh, Through Police Station Dongargaon, District Dongargaon (C.G.)

Appearance:

Ku. Sofia Khan, counsel for the appellant.

Shri M.P.S. Bhatia, Panel Lawyer, for the State.

JUDGMENT
(25.06.2007)

SUNIL KUMAR SINHA, J,

(1) This appeal is directed against the judgment of conviction and order of sentence dated 31.12.2005 passed in Sessions Trial No.95/2005 by the Addl. Sessions Judge, Rajnandgaon (C.G), whereby the appellant was convicted u/s 304 (part-I) of I.P.C. and sentenced to undergo R.I. for 10 years and to pay a fine of Rs.1000/-, in default of payment of fine to further undergo S.I. for 3 months.

(2) The appellant was charged u/s 302 & 341 of I.P.C. The allegations are that on 03.7.2005, in the morning, when the deceased Paharu Ram was sitting on the *Chaura* (platform) in front of his house, the appellant came over there and started altercations with him. After the altercation, he rushed to his house, brought an Axe and assaulted the deceased with the Axe, as a result of which the deceased fell down. This incident was witnessed by Homan Bai (P.W.2) and Kamlesh (P.W.3), who are

the daughter-in-law and grand son of the deceased. The deceased was taken to Dongargaon hospital, from where he was referred to District Hospital, Rajnandgaon, where he died. By that time, the *Dehati Nalishi* was recorded by Dongargaon Police under Ex.P.1 and the First Information Report was registered vide Ex.P.22 u/s 307 I.P.C., but later on when the death was informed, the *merg* intimation (Ex.P-2) was lodged and further investigation commenced. The body was sent for post mortem. There was one stitched wound, 4" long, obliquely placed over occipital region of scalp. When the stitches were removed and the wound was opened, one big clot (approximately of 100 grams) was present there and when the same was also removed, the autopsy surgeon detected a compound comminuted fracture of occipital bone which was broken into many pieces and it was badly lacerated with the back portion of the brain. The depth of the wound was about 4". According to the P.M. report, Ex.P-20, prepared by Dr.Rajesh Sadani (P.W.11), the cause of death was severe head injury & hemorrhage shock due to excessive bleeding.

(3) The conviction of the appellant is based upon the testimony of Homan Bai (P.W.2) and Kamlesh (P.W.3).

(4) Learned counsel for the appellant firstly submitted that while the deceased was taken to Dongargaon Hospital, he was examined by Dr. Dinesh Gupta (P.W.14), who had noticed a defused swelling and lacerated wound admeasuring 5cm x 1cm, reddish colour with bleeding present in right occipital region. According to his opinion, the injury might have been caused by hard and blunt object, but the eye-witnesses are telling that the injury was caused by a sharp edged weapon i.e., *Tangia* and it was caused from its sharp edged portion, therefore, there is discrepancy in the oral testimony and medical evidence, hence, the oral testimony of these witnesses should be rejected. Secondly, relying on the decision rendered in the matter of ***Bagdi Ram –vs- State of Madhya Pradesh 2004 Cri.L.J. 632***

(SC), she also argued that the sentence awarded to the appellant is on higher side, which should be reduced to minimum preferably to 3 years R.I. as has been held in the said case.

(5) On the other hand, learned State Counsel opposed these arguments and supported the judgment of conviction and order of sentence passed by the trial Court.

(6) Homan Bai (P.W.2) has stated that there was some land dispute between her father-in-law (deceased) and the appellant since last 3-4 years. On the fateful day, she was in her house and her father-in-law was sitting on the Chaura (Platform) of the house. The appellant, whose house is situated near their house came over there and he had some talk with her father-in-law and thereafter he went to his house and came with a *Tangia* and gave a *Tangia* blow on the back portion of the head of the father-in-law. In the examination-in-chief, she has not stated as to which portion of the Axe was used by the appellant, however, in Para 4 of her cross examination, she has admitted that the appellant had assaulted from sharp edged portion of it.

(7) Kamlesh (P.W.3), who is aged about 13 years, has also stated almost similar thing. In his cross examination vide Para 4, he stated that his grand father had received injuries from sharp edged portion of the weapon.

(8) It is on these two admissions made in the cross examination by the above two witnesses, counsel for the appellant argued that since the version of these witnesses are not supported by the medical evidence, their testimony should be disbelieved and the appellant should be acquitted.

(9) It has been held by the Supreme Court in the matter of ***State of U.P. –vs- Krishna Gopal and another, (1988) 4 SCC 302*** and further in ***Ramakant Rai –vs- Madan Rai and others AIR 2004 S.C. 77*** that "where the eye-witnesses" account is found credible and trustworthy, medical opinion pointing to

alternative possibilities is not accepted as conclusive. Importance and primacy should be given to the orality of the trial process. Eye witnesses' account would require a careful independent assessment and evaluation for their credibility which should not be adversely prejudged making any other evidence, including medical evidence, as the sole touchstone for the test of such credibility. The evidence must be tested for its inherent consistency and the inherent probability of the story; consistency with the account of other witnesses held to be creditworthy; consistency with the undisputed facts; the 'credit' of the witnesses; their performance in the witness-box; their power of observation etc. Then the probative value of such evidence becomes eligible to be put into the scale for a cumulative evaluation."

(10) Relying on the said decisions rendered by the Apex Court, this Court also held in the matter of ***Atami Laxman –vs- State of Chhattisgarh, 2007 Cri.L.J. 1036 (D.B),*** that the eye witness testimony may contain inaccuracies and exaggerations; there may be errors or omissions on account of lapse of memory or poor power of observations or inability to recount and recite accurately. Sometimes, doctors also may not bestow sufficient care while performing examination or preparing records and their opinion may be based on inadequate or incomplete or defective examination or lack of complete knowledge. It is indeed not fair to expect a total correspondence between these two items of evidence. Court must carefully examine the discrepancies and if it is reasonably possible to arrive at the substantial and true version. Court should not throw out the prosecution case on the basis of such discrepancies. Accuracy of medical witnesses and ocular witnesses depends upon several factors. Inconsistency is not sufficient to discredit an eye witness. Sometimes an eye witness may allege a blow or stab etc., but there may not be corresponding injuries. The possibility of weapon not actually striking and not causing

injury cannot be ruled out. Eye witness may err in details like direction or the blow etc. Inconsistency regarding such details between the two items of evidence may not be important. There may be discrepancies regarding the weapon or manner of attack. If the eye witness testimony is clear and convincing, discrepancies cannot matter. Doctor is a witness of both fact and opinion. Medical evidence acts as a check upon testimony of eye witness; it is also independent evidence in so far as it establishes facts e.g., tattooing marks, nature and dimensions of injury etc. Medical evidence is also corroborative of eye witness testimony, in as much as it may show that the injury might have been caused in the manner alleged. Defence could use the medical evidence to show that the injury could not have been caused as alleged and thereby discredit eye witness testimony. However, unless the medical evidence goes so far that it completely rules out all possibility whatsoever of the injuries taking place in the manner alleged by the eye witness, the prosecution version cannot be thrown out on the ground of alleged inconsistency between the two items of evidence. Court has to remember that medical evidence is mainly opinion evidence on which the court could form its own independent conclusion. In case of divergence, the Court must try to reconcile the two; if that is not possible the court has to appreciate the evidence like any other evidence, having regard to reasons and data provided by the Doctor and the cogency or otherwise of eye witness testimony. If eye witnesses are credible and trustworthy, medical opinion suggesting alternative possibility may not be accepted as conclusive. Primacy should be given to oral evidence.

(11) Therefore, it is clear that if there is discrepancy between medical and ocular evidence and where the testimony of the eye witnesses is credible and trustworthy, medical opinion suggesting alternative possibility cannot be accepted as conclusive and primacy has to be given to oral evidence.

(12) In the present case, the evidence of both eye witnesses namely Homan Bai (P.W.2) and Kamlesh (P.W.3) appears to be natural, credible and trustworthy. They had reasons to remain present at the scene of occurrence because the incident took place in front of their house and they have deposed things in the natural manner which cannot be said to be unnatural or unreliable. No reasons have been set forth to disbelieve their testimonies except the discrepancy with the medical evidence referred to above. I find their testimonies to be credible and dependable and they cannot be disbelieved on this point alone that they admitted that injury was inflicted from the sharp edged portion of the weapon used and in fact, that injury was found to be a laceration. I do not find and force in the first argument advanced by learned counsel for the appellant and the same is rejected.

(13) So far as quantum of sentence is concerned, in the matter of Bagdi Ram (supra), referred to by learned counsel for the appellant, the sentence of 8 years R.I. was held to be on higher side and reduced to 3 years on the ground that both the parties indulged in brick-batting and the persons belonging to both the parties had received injuries and there was an altercation followed by assault on P.Ws.1 and 4. The Apex Court held that when tempers ran high, in the heat of passion, upon sudden quarrel, the appellant assaulted the deceased though un unarmed, but without premeditation, which had caused only one injury to the deceased by picking up the *'gainti'* (pick axe) lying there, and in that situation the Apex Court had reduced the sentence awarded to the appellant. In the present case, after certain altercation with the deceased, the appellant rushed to his house, returned immediately armed with an Axe and gave fatal blow to the head of the deceased though he was being stopped by his wife saying as "मत मारो मत मारो" and in this situation, the Court below has awarded the sentence of 10 years R.I. to the appellant. The judgment referred to by counsel for

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the appellant is distinguishable on these points and it cannot be applied in the facts and circumstances of this case.

(14) The principle of proportion between crime and punishment is governed by the *"Doctrine of just desert"*. The doctrine is the foundation of a criminal sentence which is ultimately awarded for a punishment to the wrong doer. What one really deserves should be the punishment for having committed a crime is the underlying principle. The punishment must not be disproportionately great is a corollary of *"just desert"* which is governed by the same principle which says that there cannot be a punishment without guilt and the basic element behind the principle is the proportion between crime and punishment. The lesser is the gravity of the crime, the smaller would be the punishment and the greater is the gravity of the crime, the higher would be the punishment, subject to the ancillary factors for determining the proportion of the same, though all further subject to the statutory obligations specifically provided by law in force. I do not find any merit in the second point advanced by counsel for the appellant on the quantum of sentence also.

(15) In the result, the appeal fails and the same is dismissed. The conviction and sentence awarded by the Court below are hereby confirmed.

Sd/-
Sunil Kumar Sinha
Judge